

Before the  
Federal Communications Commission  
Washington, D.C. 20554

RECEIVED

APR 26 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 02-136
Table of Allotments,	)	RM-10458
FM Broadcast Stations.	)	RM-10663
(Arlington, The Dalles, Moro, Fossil, Astoria,	)	RM-10667
Gladstone, Portland, Tillamook, Springfield-Eugene	)	RM-10668
Coos Bay, Manzanita and Hermiston, Oregon, and	)	
Covington, Trout Lake, Shoreline, Bellingham,	)	
Forks, Hoquiam, Aberdeen, Walla Walla, Kent,	)	
College Place, Long Beach, and Ilwaco,	)	
Washington)	)	

To: The Secretary  
Attn: Assistant Chief, Audio Division, Media Bureau

**RESPONSE TO ORDER TO SHOW CAUSE**

Saga Broadcasting, LLC ("Saga"), licensee of KAFE(FM), Channel 282C, Bellingham, Washington, by its attorneys, and pursuant to Title 47 U. S. C. §§ 309 and 316, and Title 47 C. F. R. § 1.87, respectfully shows cause why the license of KAFE should not be modified. The Audio Division issued an *Order to Show Cause*, DA 04-607, released March 12, 2004, that afforded Saga<sup>1</sup> until April 26, 2004<sup>2</sup>, within which to show cause why the KAFE license should not be modified as proposed in a Counterproposal filed by Triple Bogey, LLC; MCC Radio, LLC; and KDUX Acquisition, LLC

<sup>1</sup> The license of KAFE was the subject of a *pro forma* assignment of license (BALH-20030612AJN) from Saga Broadcasting Corp. (to whom the *Order to Show Cause* was addressed) to Saga Broadcasting, LLC, the respondent herein.

<sup>2</sup> This Response is timely filed by April 26, 2004. It is supported by the Declaration of Samuel D. Bush, Treasurer of Saga (Facsimile Declaration attached. The original will be filed upon receipt).

No. of Copies rec'd 014  
List ABCDE

(collectively, "Triple Bogey").<sup>3</sup> In response to the Notice of Proposed Rule Making, *Arlington, The Dalles, and Moro, Oregon, and Covington and Trout Lake, Washington*, 17 FCC Rcd 10678 (MB 2002) ("NPRM") in this proceeding, the Triple Bogey counterproposal requested that Channel 283C2 be substituted for 284C2, Aberdeen, Washington, and that Station KDUX-FM be reallocated from Aberdeen to Shoreline, Washington. The proposal to allot Channel 283C2 at Shoreline is mutually exclusive with the NPRM's proposed reallocation of Channel 283C3, Station KMCQ(FM), Channel 283C3, The Dalles, Oregon, to Covington, Washington.<sup>4</sup> To accommodate the allotment of Channel 283C2 at Shoreline, Triple Bogey requested that Channel 281C be substituted for Channel 282C at Bellingham, Washington, with the related modification of the license of KAFE to accommodate its proposal. The Audio Division issued its *Order to Show Cause*, pursuant to Section 316(a) of the Communications Act of 1934, as amended (the "Act") directed to Saga, and herein, Saga shows why its license should not be modified as requested by Triple Bogey.

Section 316(a) of the Act requires that the Commission notify the affected station of the proposed action, the public interest reasons for the action, and afford at least 30 days to respond, in this case affording Saga until April 26, 2004, to do so. The Audio Division stated that in this

---

<sup>3</sup> The NPRM identifies MCC Radio, LLC ("MCC") as the licensee of, *inter alia*, Station KDUX-FM, Aberdeen, Washington, and Station KXXX(FM), Hoquiam, Washington. MCC and Triple Bogey, LLC ("Triple Bogey") have formed KDUX Acquisition, LLC ("KA"). Under an agreement between MCC and Triple Bogey, if MCC receives a construction permit to relocate Station KDUX-FM to Shoreline, pursuant to adoption of the Triple Bogey's proposal herein, Triple Bogey has the option to require MCC, upon grant of an assignment application, to assign Station KDUX-FM to KA.

<sup>4</sup> In addition, the Triple Bogey's proposed allotment of Channel 285A at Fossil, Oregon, conflicts with the NPRM's proposed allotment of Channel 283C1 at Moro, Oregon.

instance, the substitution of Channel 281C for Channel 282C at Bellingham, Washington, will accommodate the reallocation of Channel 283C2 to Shoreline, Oregon, as Shoreline's first local aural transmission service on which it based its decision to issue the *Order to Show Cause*.

The *Order to Show Cause* stated that the Station KAFE license can be modified to specify operation on Channel 281C at its currently authorized transmitter site, but the Canadian Government has not agreed to unlimited Class C operation on Channel 281 at that site. Instead, Channel 281C would be a specially negotiated short-spaced allotment limited to 49.2 kilowatts ERP at 600 meters HAAT, or the equivalent, along the 314.6 degree azimuth toward Channel 280A at Powell River, British Columbia, and 58.2 kilowatts ERP at 600 meters HAAT, or the equivalent, along the 0.4 degree azimuth toward Channel 281A at Bralorne, British Columbia. These power restrictions are consistent with the agreement between Saga, on the one hand, and Mid-Columbia Broadcasting, Inc., and First Broadcasting Company, L. P., on the other hand, in this proceeding looking toward the reallocation of Channel 283C2 to Kent, Washington as described in their jointly-filed counterproposal (RM No. 10663). In view of this prior agreement, the Audio Division stated that it will be necessary for Saga, Mid-Columbia Broadcasting, Inc., and First Broadcasting Company, L. P., to disclose the consideration that Saga is to receive under the agreement for the modification of the Station KAFE facilities, and that the Triple Bogey must state whether it would pay Saga this same consideration to permit the Shoreline reallocation. The Audio Division stated that if Triple Bogey agrees to pay Saga the additional consideration in the agreement, Saga would be required to show why the required modifications to the station KAFE facilities should not be implemented.

## SHOWING OF CAUSE WHY

### THE KAFE LICENSE SHOULD NOT BE MODIFIED

The Audio Division also stated “If the licensee raises any substantial and material questions of fact, a hearing may be required to resolve such questions of fact pursuant to Section 1.87 of the Rules.” Saga is raising these substantial and material questions, but does not believe a hearing is required. There are several good reasons why Saga should not be required to change its channel to accommodate Triple Bogey’s Shoreline proposal: (1) It would not be possible for Triple Bogey to duplicate the consideration involved in the transaction; (2) The counterproposal proposing the allotment of Channel 283C2 to Kent, Washington, is today being withdrawn; (3) The Commission has no legal basis for ordering an involuntary channel change under these circumstances; and (4) Permitting a rule making proponent or applicant to force a licensee to install a directional antenna to protect foreign allotments would open the regulatory floodgates to a mass of filings affecting cross-border station relationships.

**Impossibility of Duplicating Consideration.** There is in effect a “Channel Change Agreement” between Saga and Lakeshore Media, LLC, and an “Assignment and Assumption Agreement and Modification of Channel Change Agreement” (collectively “Agreements”)<sup>5</sup> among Saga, on the one hand, and Lakeshore Media, LLC, First Broadcasting Company, LP, and First Broadcasting Management, LLC (“First Broadcasting”)<sup>6</sup>, on the other hand, whereby First Broadcasting has agreed to pay to Saga, as consideration for implementation of the KAFE

---

<sup>5</sup> A document disclosing the consideration is being separately provided to the Commission’s staff today with a request for confidential treatment pursuant to Section 0.457 and 0.459 of the Commission’s Rules.

<sup>6</sup> First Broadcasting is now known as First Broadcasting Investment Partners, LLC, and the term “First Broadcasting” includes this limited liability company.

channel a cash sum to cover the expected costs of modifying KAFE's facilities, including engineering and legal fees, necessary equipment purchases and promotional costs. The Agreements also provide for substantial contingent cash payments to Saga which are, in part, calculated based on future occurrences with respect to Station KMCQ.

The consideration to be paid is unique. It would not be possible for Triple Bogey to pay the amount that First Broadcasting will pay to Saga to directionalize and change channels. Triple Bogey does not control KMCQ, and the amount due to Saga will vary considerably depending on when and if KMCQ is sold in the future, making the amount impossible to fix at this time. Triple Bogey has no equivalent asset on which to base a contingent payment. The amount would not equal the value of the station that Triple Bogey is moving to Shoreline, even if Triple Bogey were willing to sell that station in the future.

**The Counterproposal Involving KAFE Is Being Withdrawn.** Joint Petitioners are today withdrawing their counterproposal for Kent, Washington, and Mid-Columbia Broadcasting, Inc., and First Broadcasting are requesting reinstatement of their original proposal to serve Covington, Washington. This must result in the dismissal of Triple Bogey's proposal for Shoreline because Saga is unwilling to change its channel to accommodate the Shoreline proposal. Triple Bogey's counterproposal is thus defective. Since it relies on the substitution of Channel 281C for 282C at Bellingham with reduced power, it must be dismissed pursuant to *Parker, Arizona*, 17 FCC Rcd 9578 (2002).<sup>7</sup>

---

<sup>7</sup> In *Parker, Arizona*, the Audio Division said, "In light of the fact that it is Commission policy not to force an existing station to change its transmitter site or its community of license, clear consent to such changes had to be provided at the deadline for filing counterproposals or [the]...counterproposal would not be technically correct or substantially complete."

**The Commission Has No Legal Basis For Ordering A Channel Change Under These Circumstances.** This appears to be a case of first impression. Counsel for Saga has been unable to find, and, indeed, Triple Bogey has not cited, any prior case where the Commission has ordered the involuntary installation of a directional antenna to accommodate a requested channel change by another station. However, there are other cases clearly indicating that such involuntary changes are ordered only where the channel substitution is considered equivalent. In *Wasilla, Anchorage and Sterling, Alaska*, 14 FCC Rcd 6263 (Allocations Branch 1999), the Commission rejected such a proposal because (1) the use of the contour protection method, while permitted at the application stage, is not intended to cure short spacings at the allotment level, and (2) the licensee of the station that would be required to install the directional antenna had not indicated an interest in Channel 277C1. With the withdrawal of the Kent counterproposal, Saga is no longer expressing in this rule making proceeding an interest in the use of Channel 281 at Bellingham. In *Flora and Kings, Mississippi and Newellton, Louisiana*, 7 FCC Rcd 5477 (Allocations Branch 1992), the Commission refused to consider a counterproposal that proposed the downgrade of another station from Class C3 to Class A because there was no agreement from the affected station consenting to the downgrade. In the case of KAFE, granting Triple Bogey's proposal would result in an involuntary modification of the KAFE license with a reduction in signal strength to which Saga is not willing to consent.

**Potentially Dangerous Precedent Would Be Established.** Permitting a rule making proponent or applicant to force a licensee to install a directional antenna against its will would result in the filing of many petitions for rule making and applications seeking to compel stations to reduce power or install directional antennas to suppress their signals toward Mexican or

Canadian stations in order to permit facilities changes to domestic stations. This would open the proverbial floodgates to such requests. The Commission's staff would be subjected to a mass of filings. Every station along the Mexican and Canadian borders that could improve its facilities by forcing a neighboring station to install a directional antenna to protect Mexican and Canadian allotments could be expected to file petitions like Triple Bogey's. It should be noted that the Commission would not impose such a requirement in an application proceeding if there were no channel change involved. The existence of a rule making proceeding does not justify eliminating coverage over the border.<sup>8</sup>

## **CONCLUSION**

For the reasons set forth herein, Saga has shown good cause why the license of KAFE should not be modified to accommodate Triple Bogey. It is respectfully requested that the Audio Division dismiss Triple Bogey's counterproposal for the use of Channel 283C2 at Shoreline,

---


<sup>8</sup> The modification of the license of KDUX-FM is contingent on the modification of the license of KAFE. In the case of applications, Section 73.3517(e) of the Rules makes it clear that contingent applications will not be accepted unless they include a copy of the agreement to undertake a coordinated facility modification. If Triple Bogey were trying to modify the license of KDUX-FM through the application process, it would have to reach a separate agreement with

Washington, by KDUX-FM, and that Saga not be required to change the channel of KAFE to accommodate the Triple Bogey's proposal.

Respectfully submitted,

**SAGA BROADCASTING, LLC**

By:

  
\_\_\_\_\_  
Gary S. Smithwick  
Its Attorney

Smithwick & Belendiuk, P.C.  
5028 Wisconsin Avenue, N.W., #301  
Washington, D.C. 20016  
(202) 363-4050

April 26, 2004

---

Saga. Triple Bogey should not be allowed to do indirectly through the rule making process something it could not do directly through the application process without Saga's consent.



**DECLARATION**

I, Samuel D. Bush, under penalty of perjury, declare as follows:

1. I am the treasurer of Saga Broadcasting, LLC ("Saga").
2. I have reviewed the foregoing Response to Order to Show Cause.
3. The statements made therein are true and correct to the best of my knowledge, information and belief.

Executed on April 26, 2004.

A handwritten signature in cursive script, appearing to read "Samuel D. Bush", is written over a horizontal line.

Samuel D. Bush, Treasurer

**CERTIFICATE OF SERVICE**

I, Sherry Schuneman, a secretary in the law firm of Smithwick & Belendiuk, P.C., do hereby certify that I have on this 26<sup>th</sup> day of April, 2004, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "RESPONSE TO ORDER TO SHOW CAUSE" to the following

R Barthen Gorman, Esq.  
Federal Communications Commission  
236 Massachusetts Avenue, NE  
Suite 110  
Washington, DC 20002

Al Monroe  
Alco Services, Inc  
P.O Box 450  
Forks, WA 98331  
(Licensee of Station KLLM, Forks, WA)

Rod Smith  
13502 NE 78<sup>th</sup> Circle  
Vancouver, WA 98682-3309

Merle E. Dowd  
9105 Fortuna Drive  
# 8415  
Mercer Island, WA 98040

Robert Casserd  
4735 NE 4<sup>th</sup> Street  
Renton, WA 98059

Chris Goelz  
8836 SE 60<sup>th</sup> Street  
Mercer Island, WA 98040

Matthew H. McCormick, Esq.  
Reddy, Begley & McCormick  
2175 K Street, NW  
Suite 350  
Washington, DC 20037  
(Counsel to Triple Bogey, LLC et al.)

M Anne Swanson, Esq.  
Nam E. Kim, Esq  
Dow Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, NW  
Suite 800  
Washington, DC 20036  
(Counsel to New Northwest Broadcasters LLC)

Howard J Barr, Esq.  
Womble Carlyle Sandridge & Rice, PLLC  
1401 Eye Street, NW  
7<sup>th</sup> Floor  
Washington, DC 20005  
(Counsel to Mercer Island School District et al )

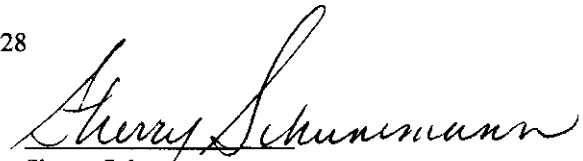
City of Gig Harbor  
3105 Judson Street  
Gig Harbor, WA 98335

Dennis J Kelly, Esq.  
Law Office of Dennis J Kelly  
P.O Box 41177  
Washington, DC 20018  
(Counsel to Two Hearts Communications LLC)

Mark N. Lipp, Esq.  
Vinson & Elkins, LLP  
1455 Pennsylvania Avenue, NW  
Suite 600  
Washington, DC 20004  
(Counsel to First Broadcasting Investment Partners, LLC)

J. Dominic Monahan, Esq  
Luvaas Cobb Richards & Fraser, PC  
777 High Street  
Suite 300  
Eugene, OR 97401  
(Counsel to Mid-Columbia Broadcasting, Inc )

Cary Tepper  
Booth Freret Imlay & Tepper, PC  
7900 Wisconsin Avenue  
Suite 304  
Bethesda, MD 20814-3628

  
Sherry Schuneman